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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 297

HERBERT C. DEESEN,
Petitioner,

vs.

THE PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, an unincorporated association, et al.,
Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Grounds	2
Argument	2

Table of Authorities Cited

Cases

	Pages
Oliver Brown v. Board of Education of Topeka, 347 US 483, 98 L ed 873, 74 S Ct 686	2, 3
Spottswood Thomas Bolling v. C. Melvin Sharpe, 347 US 497, 98 L ed 884, 74 S Ct 693	2
United States v. General Motors Corp., 384 US 127	2, 5
Washington State Bowling Proprietors Association v. Pacific Lanes, Inc., CA 9, 1966, 356 F 2d 371	2

Constitutions

United States Constitution:	
Fifth Amendment	3
Fourteenth Amendment	3

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The Petitioner respectfully renews his appeal for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 3, 1966 and printed in Appendix "B" of his original petition.

GROUNDS

This appeal is made on the following grounds:

(1) Under the Court of Appeals judgment, Petitioner is being denied the right to pursue his choice of livelihood which is guaranteed by the Fifth Amendment of the Constitution, as construed in decisions of this Supreme Court in the following cases:

(a) *Spottswood Thomas Bolling v. C. Melvin Sharpe,* 347 US 497, 98 L ed 884, 74 S Ct 693;

(b) *Oliver Brown v. Board of Education of Topeka,* 347 US 483, 98 L ed 873, 74 S Ct 686.

(2) The Court of Appeals judgment conflicts with the anti-trust laws, as outlined in Petitioner's original appeal and as further stated herein.

(3) The judgment of the Court of Appeals is contrary to decision by that same Court in *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.,* CA 9, 1966, 356 F 2d 371; and

(4) The judgment of the Court of Appeals is contrary to this Court's recent decision in *United States v. General Motors Corp.,* 384 US 127.

ARGUMENT

Prior to this Court's decision in the *Oliver Brown* and related cases, negro children had been refused admission to public schools attended by white children. This action was predicated generally on the so-called "separate but equal" doctrine introduced by this Court

in 1896 in *Plessy v. Ferguson.* In the 1954 *Oliver Brown* and related cases, this Court repudiated the "separate but equal" doctrine, declared that opportunity for public education must be made available to all on equal terms, and established the right of all to attend the school of their choice as guaranteed by the Fifth (as well as Fourteenth) Amendment to the Constitution. Obviously the same principles must apply in respect to an individual's vocational rights.

It has long been Deesen's life ambition to earn a livelihood competing in professional golf tournaments. He was never interested in, nor temperamentally equipped for, teaching golf and selling golf equipment at a country club. After flying 32 combat missions in B-24 bombers in World War II, and being honorably discharged, Deesen embarked on an intensive practicing program to perfect his game, investing much money, time and effort. In 1952 the PGA gave him an approved tournament player's contract; and he was able to get valuable tournament experience and aid from experts on the tour. In 1958 the PGA discontinued Deesen's contract because he could not make ten tournaments that year due to a smashed thumb and later an infected leg. PGA also alleged lack of ability on his part (although Mr. Tom Bolt and other prominent players vouched otherwise) and informed Deesen that he would continue to be banned from PGA tournaments regardless of how good his game became. It was not until after this suit was commenced that Deesen was permitted by the PGA to play some "test" rounds with twenty-five professionals in the

West. His scores were as good or better than those of sixty percent of the PGA players, even though he had been banned for so many years from tournaments and was under considerably greater pressure.

All of these PGA pros are permitted to participate in PGA sponsored tournaments—but Deesen is still banned. Is not this discrimination? That PGA rules not only permit, but also result in, widespread discrimination is self-evident from the fact that professional golf is the only major sport in which participation by negroes is rare. It is incredulous that this deplorable situation is due to "lack of ability." Apparently the PGA rules are as effective and wrong in keeping negroes from competing in PGA tournaments as the "separate but equal" concept was in keeping negro children from attending their choice of schools.

Under our Constitution every citizen is guaranteed certain just rights; and young men, like Deesen, have fought and died for their preservation. When the rights of *any* individual are chipped away, the freedom of *all* erodes.

The former Justice Brandeis insisted that the opportunity of everyone to compete in our society on equal terms and to make full use of all his talents is inherent in and essential to our American system; and he firmly believed that monopoly impoverished human personality. Each individual is entitled to room to grow to the full stature of his own personality. The PGA rules are preventing Deesen from so doing. Some of our top golfers in the past would not have

reached their goal if, on the way up, their career had been thwarted by the present discriminatory rules of the PGA.

The Ninth Circuit Court of Appeals ruled that "Deesen could still engage in such tournaments if he chose to become a golf teacher employed by a golf club." This will take five years and there have already been too many delays without adding another five years. Furthermore teaching golf and competing in golf tournaments are two separate vocations. The Court of Appeals judgment is therefore just a repetition of the old "separate but equal" concept of satisfying one's rights under Amendment Five of the Constitution.

As previously stated, Deesen is not interested in teaching golf nor is he temperamentally suited therefor. Even were he so inclined, where would Deesen get a job in a golf club if he has to say that the PGA has discontinued his tournament players contract because of lack of ability?

In certain tournaments not sponsored by the PGA, like the United States Open Championship, everybody has an equal opportunity to play the qualifying rounds. What is there to prevent the PGA from doing likewise, to solve its crowding problem rather than continue its discriminatory rules?

Finally, this Court recently decided in *United States v. General Motors Corp.*, 384 US 127, that "Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the [Sher-

man] Act". What rational distinction exists between that case and *Deesen?* In both, there was:

(1) joint collaborative action and

(2) elimination or exclusion of competitors from a market.

Petitioner submits there is no rational distinction, and that the foregoing *per se* principles should apply here.

We are concerned not with Deesen's ability to play professional golf, but with the legality of PGA's rules under the anti-trust laws—if the rules are illegal, as they must be since they are discriminatory on their face, then this Court must so hold. Whether or not Petitioner Deesen has been damaged by these rules is a question for the District Court on remand.

Dated, San Francisco, California,
December 15, 1966.

Respectfully submitted,
BURT S. HOFMANN,
ALLEN, POGGI & HOFMANN,
By BURT S. HOFMANN,
Attorneys for Petitioner.

VERIFICATION

State of California,
City and County of San Francisco.—ss.

I, Herbert C. Deesen, hereby declare the following under penalty of perjury: I am the petitioner; I am verifying the petition; I am familiar with the facts stated therein; the said facts are within my knowledge; I have read the foregoing petition and know the contents thereof and same is true of my own knowledge.

Dated, San Francisco, California,
December 19, 1966.

HERBERT C. DEESEN

(Seal)

MARIE B. DILLON,
Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL

I certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 (2) of Rules of the Supreme Court of the United States.

BURT S. HOFMANN,
Attorney for Petitioner.